STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020 - 0260

Brent Tweed and G&F Goods
(Plaintiffs/Appellees)

v.

Town of Nottingham
(Defendant)

Discretionary Appeal Pursuant to Rule 7
from a Decision of Rockingham Superior Court

BRIEF FOR THE APPELLANT NOTTINGHAM WATER ALLIANCE, INC

Submitted by: Kira A. Kelley, Esq.
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(Fifteen Minutes Oral Argument Requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NEW HAMPSHIRE STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

QUESTIONS PRESENTED

I. Whether the Superior Court erred by concluding that the Nottingham Water Alliance lacks a right and a direct, apparent interest as required to intervene in a New Hampshire State Court Proceeding, when facts show that the Ordinance enshrines rights and protections for the NWA and its members.

Issue preserved by Motion to Intervene, Motion to Reconsider, and Renewed Motion to Intervene. See Apx.[1] at 36, 125, 189.

II. Whether prospective intervenor-defendants in New Hampshire State Court must show State Constitutional standing, when New Hampshire courts have a history of allowing intervention even after a finding that the intervenor lacks constitutional standing.

Issue preserved by Motion to Intervene, Motion to Reconsider, and Renewed Motion to Intervene. See Apx. at 36, 125, 189.

[1] Abbreviated Citations to the record are as follows:
"Apx." refers to the appendix accompanying this brief;
"Add." refers to the addendum included at the end of this brief;
"Super. Ct. Civ. R. 15" refers to New Hampshire Superior Court Civil Rule 15, reproduced in full on page 5 of this brief; and
"Ordinance" refers to the Nottingham, New Hampshire's Freedom from Chemical Trespass Rights-Based Ordinance, reproduced in full on pages 5-7 of this brief.

TEXT OF RELEVANT AUTHORITIES

SUPERIOR COURT CIVIL RULES OF THE STATE OF NEW HAMPSHIRE

Rule 15, Intervention:

Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause; or, upon motion of any party, such person may be made a party by order of court notifying him or her to appear therein. If a party, so notified, neglects to file an Answer or other responsive pleading on or before the date established by the court, that party shall be defaulted. No such default shall be set aside, except by agreement or by order of the court upon such terms as justice may require.

Super. Ct. Civ. R. 15.

FREEDOM FROM CHEMICAL TRESPASS RIGHTS-BASED ORDINANCE

Section 1 - Statements of Law

(a) Right of Self-Government. All residents of Nottingham possess a right of self government, which includes, but is not limited to, the following rights: first, the right to a system of local government founded on the consent of the people of the municipality; second, the right to a system of local government that secures their rights; and third, the right to alter any system of local government that lacks consent of the people or fails to secure and protect the people's rights, health, safety and welfare. Any action to annul, amend, alter, or overturn this Ordinance shall be prohibited unless such action is approved by a prior Town vote at which a majority of the residents of the Town voting approve such action.

(b) Right to a Healthy Climate. All residents of Nottingham possess a right to a climate system capable of sustaining human societies, which shall include the right to be free from all corporate activities that infringe that right, including chemical trespass resulting from the physical deposition or disturbance of toxic wastes, which, for the purposes of this ordinance, includes petroleum refining wastes, coal combustion wastes, sewage sludge, heavy metals, chemical residue from manufacturing processes, mining residuals, radioactive wastes, or any other waste that poses a present or potential hazard to human health or ecosystems.

(c) Right to Clean Air, Water, and Soil. All residents of Nottingham possess the right to clean air, water, and soil, which shall include the right to be free from all corporate activities that release toxic contaminants into the air, water, and soil, including chemical trespass resulting from the physical deposition or disturbance of toxic wastes.

(d) Rights of Ecosystems and Natural Communities. Ecosystems and natural communities within Nottingham possess the right to naturally exist, flourish, regenerate, evolve, and be restored, which shall include the right to be free from all corporate activities that threaten these rights, including chemical trespass resulting from the physical deposition or disturbance of toxic wastes.

(e) Right to Protection from Governmental and Corporate Interference. All residents of Nottingham and the Town of Nottingham possess the right to enforce this Ordinance free of interference from corporations, other business entities, and governments. That right shall include the right of residents to be free from ceiling preemption, because this Ordinance expands rights and legal protections for people and nature above those provided by less-protective state, federal, or international law.

Section 2 – Enforcement

(a) Any business entity or government that willfully violates any provision of this Ordinance shall be subject to a civil penalty in an amount of $1,000 per day of violation.

(b) Any business entity or government that willfully violates any provision of this Ordinance also shall be liable for any injury to an ecosystem or natural community caused by the violation. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Town of Nottingham to be used exclusively for the full and complete restoration of the ecosystem or natural community.

(c) Ecosystems and natural communities within Nottingham may enforce or defend this Ordinance through an action brought in the name of the ecosystem or natural community as the real party in interest.

(d) Any resident of Nottingham may enforce or defend this Ordinance through an

action brought in the resident's name. Any resident, and any ecosystem or natural community, also shall have the right to intervene in any action concerning this Ordinance in order to enforce or defend it, and in such an action, the Town of Nottingham shall not be deemed to adequately represent their particularized interests.

(e) If the Town of Nottingham fails to enforce or defend this law, or a court fails to uphold this law or purports to declare it unlawful, the law shall not be affected, and any resident may then enforce the rights and prohibitions of the law through non-violent direct action. If enforcement through non-violent direct action is commenced, this law shall prohibit any private or public actor from filing a civil or criminal action against those participating in such non-violent direct action. If an action is filed in violation of this provision, the applicable court must dismiss the action promptly, without further filings being required of direct-action participants. "Direct action" as used by this provision shall mean any non-violent activities or actions carried out to directly enforce the rights and prohibitions contained within this law.

Nottingham, N.H. Ordinances, Freedom from Chemical Trespass Rights-Based Ordinance, adopted March 16, 2019.

STATEMENT OF THE CASE

The issues presented explore the standard for intervention in New Hampshire state court, and the effects of its denial in a lawsuit where the existing opposing parties are in complete agreement on the substantive issue and where this appellant's rights are freely ignored.

The Nottingham Water Alliance, Inc. ("NWA") takes this appeal from the Rockingham Superior Court's orders denying the NWA's Renewed Motion to Intervene and the NWA's original Motion to Intervene. Add. at 39, 22.

NWA filed the Renewed Motion to Intervene after newly available evidence showed that the Town of Nottingham did not intend to defend against the lawsuit, Tweed v. Nottingham, which sought to overturn an ordinance that the Town of Nottingham has neither drafted, voted on, enforced, nor defended.

This appeal constitutes the final recourse of a civic organization asking for nothing more than a chance to defend its members' rights to participate in their own governance.

STATEMENT OF THE FACTS

The NWA is a nonprofit corporation comprised entirely of Nottingham voters, whose stated principle purpose is "educating the residents of Nottingham about local self-government," which is the right and the duty that constituents hold, to proactively shape their governing body to serve the public good of all residents. Apx. at 37.

From, at minimum, March 2018 to March 2019, the NWA's primary organizational focus was reaching out to Nottingham residents to gather input on, and subsequently support for, the Freedom from Chemical Trespass Ordinance ("Ordinance"). Apx. at 42.

NWA members gathered signatures to put the Ordinance on the Town Meeting ballot and Nottingham voters adopted the Ordinance on March 16, 2019. Apx. at 37.

Aside from allowing that properly petitioned article on the ballot and from hosting

an annual Town Meeting as state law requires, the Town of Nottingham has taken absolutely no actions with regard to the Ordinance: the Ordinance has never been enforced, and was not even posted on the Town of Nottingham's website. Apx. at 201.

Despite the Town of Nottingham having neither spent nor pledged funds to enforce the Ordinance, Brent Tweed and his corporation G&F Goods, LLC ("Plaintiffs") filed a declaratory judgement action against the Town of Nottingham ("Defendant[2]") on the theory of taxpayer standing. Apx. at 3.

The Superior Court, with Defendant's consent, granted Plaintiffs' request for preliminary injunctive relief to prohibit Defendant from enforcing the Ordinance during the pendency of the proceedings, which injunction remains in effect. Apx. at 185.

The NWA moved to intervene as a defendant in the case, citing New Hampshire Superior Court Rule 15, which the Court denied on the grounds that NWA lacked state constitutional standing and because the NWA failed to show that the existing Defendant inadequately represented its interests.[3] Apx. at 36 and Add. at 22.

The NWA filed a Motion to Reconsider, asking the Rockingham Superior Court to reevaluate: (1) whether constitutional standing is a prerequisite to a prospective Defendant qualifying for intervenor status, (2) whether the NWA met the Rule 15 standard by its plain terms, and (3) whether inadequate representation was indeed a prerequisite to Rule 15 intervention. Apx. at 125.

On August 27, Plaintiffs objected to the Motion to Reconsider. Apx. at 131. The next morning, the NWA filed a timely notice of intent to reply to that objection. Apx. at 134. Later that same day, the Rockingham Superior Court in a margin order denied the Motion to Reconsider. Apx. at 125.

The Court, upon mutual request, ordered the parties to exchange summary

[2] Originally, the named defendants were the Town of Nottingham and Donna Danis, but the parties mutually agreed to drop the individual defendant.

[3] The Rockingham Superior Court found that "whether to allow a potential intervenor the opportunity to participate even in a limited role depends on whether the prospective intervenor's rights are adequately represented in the litigation," indicating the Court's position that inadequate representation is a required element either for an *amicus curiae* or an intervenor with full party status. Add. at 35.

judgement briefs in lieu of a trial. Plaintiffs filed a Motion for Summary Judgement and a supporting Memorandum requesting that the Court declare the Ordinance invalid and award attorneys fees to Plaintiffs. Apx. at 136, 139.

Defendant responded with a partial objection that wholly conceded the substantive issue and contested only Plaintiffs' demand for attorney's fees. Apx. at 182, 184.

With new evidence on the record that the existing Defendant would inadequately represent the NWA's interest, the NWA renewed its Motion to Intervene. Apx. at 189. The Court denied this Renewed Motion but invited the NWA to submit an *amicus* brief because "the Town does not intend to contest Plaintiffs' position" and therefore "the NWA's interest in defending the Constitutionality of the Ordinance is no longer being adequately represented by the Town." Add. at 45-46.

The NWA submitted an *amicus* brief, Apx. at 199, and also filed this appeal to note that the NWA should have been granted full party status to provide the only vigor to an otherwise one-sided litigation.

SUMMARY OF THE ARGUMENT

The NWA takes to heart the principles in the New Hampshire Constitution that, for a government to be by and for the people, government must be accessible, accountable, and instituted for the common benefit. To this end, the NWA seeks the opportunity to defend the Ordinance whose adoption the NWA made possible and whose provisions grant the NWA actionable rights.

Since both existing parties at the trial court have agreed to seek invalidation of the Ordinance, the NWA's rights and interest in the Ordinance's environmental, safety, and democratic protections are sacrificed while the NWA remains sidelined.

Lack of state constitutional standing is not a valid basis to deny a motion to intervene. Intervenor standing is not jurisdictional, unlike constitutional standing, because arguments challenging intervenor standing may be waived.

The codified right to intervene to defend the Ordinance cannot be denied *before* a

court overturns it, which decision a court cannot make at the behest of two supposedly opposing parties seeking the same substantive relief.

ARGUMENT

I. The trial court abused its discretion by finding that the NWA failed the Rule 15 standard for intervention, because the uncontested invalidation of the Ordinance would sacrifice NWA members' codified rights as well as the interest in upholding the Ordinance that even the trial court acknowledged.

The New Hampshire Superior Court Civil Rules offer a bare-bones standard for who may intervene in a state court proceeding: "any person shown to be interested." Sup. Ct. Civ. R. 15. This Court elaborated that Rule 15 requires showing "a right involved in the trial and a direct and apparent interest therein." Lamarche v. McCarthy, 158 N.H. 197, 200 (2008).

Superior courts have discretion over who may intervene in civil proceedings, and the "right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice." Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 446 (2002).

A decision to grant or deny a motion to intervene is overturned on appeal only if the Supreme Court finds that the trial court abused its discretion in applying the standard for intervention. Snyder v. N.H. Savings Bank, 134 N.H. 32, 34 (1991).

An abuse of discretion occurs when the appellant demonstrates "that the court's ruling was clearly untenable or unreasonable to the prejudice of the appellant's case." G2003B, LLC v. Town of Weare, 153 N.H. 725, 729 (2006). An unreasonable ruling might be an order based on factual findings that are unsupported by the evidence, Dow v. Town of Effingham, 148 N.H. 121, 124 (2002), such as when the court finds the absence of a right and an interest despite facts on the record indicating that, by definition, these elements are present.

The Rockingham Superior Court in Tweed v. Nottingham abused its discretion by

overlooking facts in this case showing that the NWA has exactly what Rule 15 requires: actionable rights at stake and a direct, apparent interest in the outcome of the litigation.

A. The NWA has rights at stake in Tweed v. Nottingham, which are explicitly listed in the Ordinance and which the NWA stands to lose if the trial court grants the existing parties' mutually sought-after relief.

The NWA has rights at stake in this litigation because an unfavorable ruling could strip the NWA and its members of legally cognizable protections and actionable rights.

One actionable "right" that this Court affirmed as a basis for intervention was the right to request access to sealed court records. Petition of Keene Sentinel, 136 N.H. 121, 125 (1992). Another actionable right qualifying a prospective party to intervene in a foreclosure proceeding was a statute entitling a leaseholder to receive notice of a foreclosure sale. Snyder, 134 N.H. at 35.

A prospective party may intervene on the basis of property rights, such as the landowners in Dow v. Town of Effingham who intervened to defend against a facial and as applied challenge to an ordinance brought by a developer seeking to build a racetrack adjacent to the intervenors' land. 148 N.H. at 123.

The NWA and the Nottingham residents who comprise its membership have statutory rights outlined in the Ordinance: to self government, § 1(a); to a healthy climate, § 1(b); to clean air, water, and soil, § 1(c); to be free from governmental and corporate interference, § 1(e); and to enforce and defend the Ordinance, including through intervention, § 2(c)-(e), *inter alia*.

These rights belong to everyone, but are accessible through this Ordinance specifically to all residents of Nottingham. "All residents of Nottingham and the Town of Nottingham possess the right to enforce this Ordinance." Ordinance, § 2(f). Similarly, the newspaper's statutory right to request court documents belonged to "any member of the public." Keene Sentinel, 136 N.H. 121 at 125.

Eroding protections for the climate, soil, air, water, ecosystems, and government of Nottingham threatens the property rights of anyone owning or leasing land in

Nottingham. More importantly, challenging these rights implicates Nottingham residents' health, safety, and constitutional right to an accountable government. See, e.g. N.H. Const. part I, art. 8: "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them." and art. 10: "Government being instituted for the common benefit, protection, and security, of the whole community."

The Rockingham Superior Court categorized the rights in this ordinance as "purported," e.g. Add. at 40, and fails to recognize these rights as the NWA's actionable, enforceable stake in the underlying litigation that the requested relief endangers.

The trial court must begin with a presumption that these rights exist until otherwise adjudicated: "when a municipal ordinance is challenged, there is a presumption that the ordinance is valid." Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 498 (2007) (quoting Town of North Hampton v. Sanderson, 131 N.H. 614, 619-20 (1989)).

Plaintiffs bear the burden of proof that these rights are not enforceable or actionable, which arguments should be made against an opposing party, not a party in total, albeit apathetic, agreement. Instead of requiring Plaintiffs to prove the invalidity of the Ordinance, the trial court has abused its discretion by assuming its unenforceability as a preliminary matter in order to deny the NWA's intervention.

The Rockingham Superior Court denied the NWA's intervention in the lawsuit brought to settle whether the NWA's rights are enforceable, based on a finding that the NWA lacked any actionable rights at stake in the trial, despite the Ordinance itself codifying the NWA's right to intervene. Ordinance, § 1(d).

As a matter of law, a local ordinance vesting a right of intervention in any resident automatically gives residents standing to intervene in defense of that ordinance pursuant to New Hampshire Superior Court Civil Rule 15, because the contested right to intervene is itself a "right and apparent interest" in the case.

The outcome of this case sought by Plaintiffs (and Defendant), that the Ordinance

be declared unenforceable, threatens to deprive the NWA of the rights outlined above. The NWA is entitled to participate in the case as a party to the extent that issues revolve around the preservation or elimination of the Ordinance codifying its rights.

B. The NWA has interests in defending the Ordinance because the Ordinance protects the NWA members' health and property rights and furthers the NWA's organizational goals, which interests would be sacrificed without the NWA's participation as a party to the case.

To be direct and apparent, an interest must be "such as would suffer if not indeed be sacrificed were the court to deny the privilege." Snyder, 134 N.H. at 35.

"Interests" that are direct and apparent enough to satisfy the standard for intervention include an interest in invalidating a foreclosure sale that jeopardized the intervenor's leasehold, Snyder, 134 N.H. at 35.

An interest in viewing sealed court records to further an organizational purpose carried a motion to intervene in a divorce proceeding notwithstanding that the intervening newspaper lacked a "direct and apparent interest as would a party in the subject matter of the underlying litigation." Keene Sentinel, 136 N.H. at 125.

Upholding the constitutionality of an ordinance that the named municipal defendant did not support and that the residents drafted was a sufficient interest to warrant residents' intervention in G2003B, LLC v. Town of Weare, 153 N.H. 725 (2006).

In 2002, a group of Weare residents gathered support and petition signatures to place an ordinance on their town meeting ballot, which the voters later adopted. Id. at 726. A landowner in Weare filed a declaratory judgement action against the town challenging the ordinance facially and as applied to the plaintiff's parcel. Id.

The Rockingham Superior Court notes that the G2003B Court "upheld the trial court's decision to allow residents to intervene in a limited role," but then claimed that the G2003B Court used "intervenor" when really it meant *amicus curiae*. Add. at 33.

The more logical interpretation of G2003B (rather than assuming that this Court misspoke in a judicial opinion) is that intervenor status was limited not by diluting the

intervenors' ability to participate in the case as a whole, but by restricting their full participation just to the issue of the constitutionality of the Ordinance and not allowing the intervenors to litigate the issue of its application.

The NWA, like the Weare intervenors, is not a special interest lobby group whose intervention "would open the floodgates" for intervenors when controversial laws are challenged. Add. at 28. Indeed, without the NWA this challenge has no controversy at all.

The NWA is not a "special interest group," id., it is a group of residents whose health, safety, and welfare the Ordinance protects and whose interests in seeing the Ordinance upheld are far more than academic, they are direct and apparent. The members of the NWA are all residents of Nottingham. NWA members breathe Nottingham air, drink Nottingham water, and serve as active constituents of Nottingham government.

Perhaps mere drafting of a law does not create a direct and apparent interest in seeing that law upheld, id., but the analysis conducted by the trial court was unreasonable and untenable given facts on the record showing that the Ordinance also implicates the health, safety, and property rights of the NWA and its members. Whether as owners or as leaseholders like in Snyder, 134 N.H. 32, the weakening of protections to NWA members' homes and health vests them with an interest in seeing this Ordinance upheld.

Not only did the NWA champion the law, but also the law codifies rights that cut to the heart of the NWA's *raison d'être* as an organization - empowering residents to shape governments that truly serve the people.

The Keene Sentinel Court allowed a newspaper to intervene, despite it lacking an interest in the terms of the underlying divorce, to further its organizational purpose of uncovering newsworthy information. The NWA has a similar interest in upholding the Ordinance to further its organizational goals that the Ordinance enshrines as rights: promoting local self governance instituted for the public good.

The Rockingham Superior Court conceded that the NWA has an interest in upholding the constitutionality of the Ordinance. Add. at 46. ("[T]he Court finds that the

NWA's interest in defending the constitutionality of the Ordinance is no longer being adequately represented by the Town."). This concession, alone, should have caused the trial court to review the factors governing intervention and to reverse its prior determination.

The NWA's interest in upholding the Ordinance is "direct and apparent" and is "sacrificed were the court to deny this privilege," Snyder, 134 N.H. at 35, because the NWA's *amicus curiae* brief provides the sole legal defense of the Ordinance. Courts are precluded from using arguments brought only by *amici curiae* as a basis for its decision. United States v. Sineneng-Smith, 590 U.S. ___ (2020). The trial court cannot uphold the Ordinance on the basis of the NWA's defense without first admitting the NWA as a party.

Instead, the Rockingham Superior Court rests on its assertion that prospective intervenors must first show constitutional standing, a requirement that courts in this state have never before imposed on parties joining a case through Superior Court Rule 15.

II. As a matter of law, prospective intervenors in New Hampshire State Court need not first show constitutional standing because, unlike constitutional standing, intervenor standing in New Hampshire is not jurisdictional.

New Hampshire courts historically have allowed intervention even after a finding that the intervenor lacks constitutional standing, intimating that the Rockingham Superior Court made a clear error in legal interpretation by reading a jurisdictional standing requirement into Rule 15 as the basis for denying the NWA's Motion to Intervene.

This Court reviews questions of law *de novo* and overturns misapplications of law based on *clear error*. Dow v. Town of Effingham, 148 N.H. 121, 124 (2002).

Imputing a jurisdictional standing component to Rule 15 is a clear error, when precedent from this Court shows that parties may proceed in a case as intervenors even after a court has found that the intervenors lack the jurisdictional standing required to bring a lawsuit. Prof'l Fire Fighters of N.H. v. State of N.H., 167 N.H. 188, 191 (2014).

The trial court acknowledges that constitutional standing is jurisdictional:

"because standing is a prerequisite for subject matter jurisdiction, a court cannot allow a party to seek judicial relief without establishing that the party has standing under the New Hampshire Constitution." Add. at 26. However, the trial court overlooked the ample precedent showing that intervenor standing is not jurisdictional.

In Prof'l Firefighters of N.H., this Court approved a trial court decision "dismiss[ing] the four individual plaintiffs for lack of standing, but allow[ing] them to proceed as intervenors." Id. This Court then declined to explore the issue of the intervenors' standing on appeal because the defendant did not raise this challenge. Id.

Similarly, this Court deemed the issue of intervenor standing waived when parties failed to raise the challenge on appeal or brief the issue in Am. Fed'n of Teachers v. State, 167 N.H. 294, 299 (2015).

Courts do not need parties to raise, preserve, or brief issues of constitutional standing in order to analyze whether a party should properly be before them, because constitutional standing is a component of subject matter jurisdiction, which a court may explore *sua sponte*. "A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive it." In the Matter of Ball & Ball, 168 N.H. 133 (2015).

If a challenge to intervenor status may be waived for failure to raise or preserve the issue, qualifying for intervenor status must not be a matter of jurisdictional standing.

This Court has waived challenges to intervenor standing in Am. Fed'n of Teachers and Prof'l Firefighters of New Hampshire. Therefore, intervention requires a more lenient and non-jurisdictional form of "direct and apparent interest" than traditional standing.

If a party has standing to intervene to defend an ordinance only when a concrete application of the ordinance is at issue giving rise to jurisdictional intervenor standing, this would incentivize plaintiffs to bring facial challenges against municipalities. Such a ruling would encourage legal paradoxes like this one, where a defendant municipality

readily conceded the democratically identified needs of its residents at the behest of a corporation and its operator.

This further exemplifies the need for greater accountability to the people, who must be allowed to defend their own ordinances. Otherwise, the voter initiative petition becomes a performative facade that municipalities can and will nullify when corporations, whose lawyers are fully tax deductible, inevitably file suit.

The NWA has intervenor standing to oppose an otherwise uncontested bid for judicial relief, which bid itself has questionable constitutional standing without the guaranteed vigor of a two sided argument.

CONCLUSION

The NWA has a right and a direct, apparent interest in upholding the Ordinance; the Ordinance contains legally cognizable rights that the NWA stands to lose if two parties ostensibly on opposing sides yet in perfect agreement decide to strip NWA members of those rights. Constitutional standing is not a prerequisite to intervenor status, and may not now be used to avoid airing a conflict before the courts when the alternative results in Plaintiffs bringing an action against a Defendant willing to concede the NWA's rights. The NWA respectfully requests that this Court overturn the trial court's order denying NWA intervention and remand the case to the trial court for further proceedings with all parties properly included.

REQUEST FOR ORAL ARGUMENT

The Nottingham Water Alliance hereby requests fifteen minutes of time for oral argument, before the full Supreme Court. Oral argument is warranted for an issue as important to justice as the standard for intervention, to allow parties and this Court to explore the legal support for, interests in favor of, and possible effects on future intervenors of a ruling in this case.

RULE 16(3)(i) CERTIFICATION

Counsel hereby certifies that the appealed decisions are in writing and are appended as an Addendum to this brief.

Respectfully submitted,

THE NOTTINGHAM WATER ALLIANCE, INC.,

By its attorney,

Date: August 3, 2020

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STATEMENT OF COMPLIANCE

The undersigned counsel for the appellant hereby certifies in accordance with New Hampshire Supreme Court Rule 26(7) that this brief complies with New Hampshire Supreme Court Rules 26(2)-(4) and 16(11). Counsel specifically certifies that all issues raised in this appeal were properly presented to the court below and preserved by properly filed pleadings. Counsel also certifies that the portion of the brief from "Questions Presented" to "Request for Oral Argument" does not exceed 9,500 words.

Date: August 3, 2020

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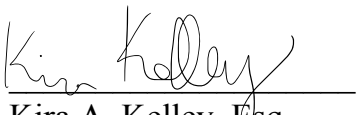
CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this date a copy of this appeal has been served electronically on Attorney Michael Courtney for the Town of Nottingham and on Attorney Richard Lehmann for Brent Tweed and G&F Goods, LLC, through the e-filing system of this Court.

Date: August 3, 2020



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ADDENDUM

TABLE OF CONTENTS

Order **Page**

The State of New Hampshire
Superior Court

Rockingham

BRENT TWEED, ET AL.

v.

TOWN OF NOTTINGHAM, ET AL.

No. 218-2019-CV-0398

ORDER ON NOTTINGHAM WATER ALLIANCE'S MOTION TO INTERVENE

At issue is whether Nottingham Water Alliance ("NWA") should be allowed to intervene in support of a town ordinance being challenged by the plaintiffs. After considering the pleadings, arguments, and applicable law, NWA's motion to intervene is DENIED.

Facts and Procedural History

On March 16, 2019, the voters of the Town of Nottingham voted to enact "The Freedom from Chemical Trespass Rights-Based Ordinance" (the "Ordinance"). See Doc 1, Ex. 1 (hereinafter cited as "Ordinance").[1] This Ordinance creates (or asserts as already existing) a bevy of rights, the violation of which would expose a business or government entity to a fine of $1,000 per day. Ordinance, § 2(a). Among the rights it confers upon the residents of Nottingham, the Ordinance purports to create a right for any resident, ecosystem, or natural community "to intervene in any action concerning this Ordinance." Id. at § 2(d).

[1] "Doc." references refer to the numbers assigned to the documents in the Court's file.

Shortly after the Ordinance was enacted, the plaintiffs, an individual resident of Nottingham and a Delaware LLC doing business in New Hampshire, filed suit in this Court challenging the Ordinance under a plethora of legal and constitutional theories and seeking a declaratory judgment that the law is facially invalid. See Doc. 1 (Compl.). After the Town of Nottingham filed an answer, NWA moved to intervene in the case on the grounds that it has a direct and apparent interest in the case because it played a central role in enacting the law. See Doc. 8 (Defs.' Answer); Doc. 11 (NWA Mot. Intervene). Further, NWA alleged that it has substantive rights both created in and protected by the Ordinance, including the right to "participate in lawsuits concerning its legality." Doc. 11 at 4. Finally, NWA claimed that its members' interests are not adequately represented by the Town of Nottingham acting alone as a party in the case because it was the citizens of Nottingham, and not the "municipal corporation," who enacted the Ordinance. Id. at 5.

The plaintiffs filed an objection to NWA's motion to intervene, arguing that NWA lacks a sufficiently direct and apparent interest to justify intervention. See Doc. 13 (Pls.' Obj. Mot. Intervene). In their motion, the plaintiffs raise concerns that adding NWA as a party will greatly increase the duration and cost of litigation in this case. Specifically, the plaintiffs point to the relationship between NWA and the Community Environmental Legal Defense Fund ("CELDF"), which the plaintiffs allege has a history of frivolous and time-consuming litigation over similar ordinances.[2]

[2] The plaintiffs also attached an order from the U.S. District Court for the Western District of Pennsylvania (Baxter, M.J.), which imposed sanctions on an attorney for CELDF for pursuing frivolous claims and defenses. See Doc. 13, Ex. H (Pennsylvania General Energy Co., LLC v. Grant Township, Case No. 14-CV-209 (W.D. Pa. 2018)).

NWA filed a response to the plaintiffs' objection, laying out in greater detail its legal basis for intervention. See Doc. 16 (NWA Resp. Pls.' Obj. Mot. Intervene). NWA again claimed that the Ordinance created a right for it to intervene in the case. Additionally, NWA argued that potential litigation costs are irrelevant to the Court's analysis of the legal standard for intervention. Finally, NWA reiterated that the Town of Nottingham does not have the same motivation as NWA in defending the Ordinance.

Currently, there is a temporary injunction in place barring the enforcement of the Ordinance, and there is a motion to dismiss filed by NWA which is held in abeyance until the resolution of its motion to intervene. See Doc. 12 (NWA Mot. Dismiss).

Analysis

I. NWA Must Establish Standing to Intervene in this Litigation

NWA advances three main arguments as to why its motion to intervene should be granted: (1) the Ordinance creates a legal right for residents of Nottingham (and NWA on their behalf) to intervene in cases involving the Ordinance; (2) NWA has a direct and apparent interest in the litigation because it played an integral role in the passage of the Ordinance; and (3) the Town has a different motivation in defending the Ordinance because the citizens of Nottingham—ostensibly represented by NWA—and not the "municipal corporation," lobbied for and enacted the Ordinance. Each of these arguments is addressed below. Before the Court addresses these specific issues, the Court will address the issue of whether a prospective intervenor must have standing to be involved in the litigation.

New Hampshire's Civil Rules of Procedure state that "[a]ny person shown to be interested may become a party to any civil action upon filing and service of an

Appearance and pleading briefly setting forth his or her relation to the cause . . . ." Super. Ct. Civ. R. 15 (formerly R. 139). "A person who seeks to intervene in a case must have a *right* involved in the trial and his *interest* must be direct and apparent; such as would suffer if not indeed be sacrificed were the court to deny the privilege." Snyder v. New Hampshire Sav. Bank, 134 N.H. 32, 35 (1991) (quoting R. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 176 at 129–30 (1984)) (emphasis in original). Thus, the test for determining whether to allow a prospective litigant intervenor status has two element: (1) the aspiring intervenor must have a direct and apparent interest to be vindicated through the court process and (2) the potential intervenor must have a right that is involved in the litigation already pending in court. For the reasons set forth below, the first element of intervenor status goes to the potential intervenor's standing to seek a judicial remedy. The second prong on the intervenor test is whether that prospective intervenor should be allowed to vindicate that legal or equitable interest in a case already pending in court between other parties. Whether to grant or deny a motion to intervene is ultimately within the discretion of the Court. Lamarche v. McCarthy, 158 N.H. 197, 200 (2008) (quotation omitted).

NWA cites three cases for the proposition that a party does not need to establish standing to intervene in cases challenging the validity of a law. See Doc. 11 at 3. However, these cases are premised on the opposite conclusion. See Am. Fed'n of Teachers v. State, 167 N.H. 294, 299 (2015) (stating that "we assume, without deciding, that the non-individual plaintiffs have standing to be intervenors" in the case, when the parties failed to raise the issue on appeal); Prof'l Fire Fighters of N.H. v. State, 167 N.H. 188, 191 (2014) (concluding the same); G2003B, LLC v. Town of Weare, 153 N.H. 725,

728 (2006) ("[W]e assume without deciding that the intervenors have standing to contest the trial court's ruling."). By assuming that the parties did have standing before starting their analysis, the Supreme Court implied that the parties needed some degree of standing to continue in the case as intervenors. See also In re Keene Sentinel, 136 N.H. 121, 125 (1992) (finding that because a newspaper had standing to petition the trial court for records, it could intervene in a divorce case in which it was seeking records). More importantly, because standing is a prerequisite for subject matter jurisdiction, a court cannot allow a party to seek judicial relief without establishing that the party has standing under the New Hampshire Constitution. See Duncan v. State, 166 N.H. 630, 639-40 (2014).

The federal courts are split on the issue of whether a prospective intervenor must establish standing under Article III of the U.S. Constitution. See City of Chicago v. Fed. Emergency Mgmt. Agency, 660 F.3d 980, 984 (7th Cir. 2011) (citing cases). Generally, those courts which do not require an intervenor to have Article III standing reason that so long as there is a "case or controversy" between the primary litigants, the potential inventor does not need to establish it has independent standing to pursue a judicial remedy. See, e.g., Loyd v. Alabama Dep't of Corr., 176 F.3d 1336, 1339 (11th Cir. 1999) ("we note that this circuit has held that a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit" (quotation omitted)).

This Court finds the analysis of the federal circuit courts which require Article III standing persuasive. As the Seventh Circuit succinctly explained:

> The cases that dispense with the requirement overlook the fact that even if a case is securely within federal jurisdiction by virtue of the stakes of the existing parties, an intervenor may be seeking relief different from that sought by any of the original parties. His presence may turn the case in a new direction—may make it really a new case, and no case can be maintained in a federal court by a party who lacks Article III standing.

Id. at 985 (citations omitted).

The Ordinance at issue in the case at bar purports to grant standing to intervene to "[a]ny resident, and any ecosystem or natural community." Ordinance, § 2(d). As a general proposition, "[s]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Petition of Guillemette, 171 N.H. 565, 569 (2018) (quotation omitted). While the Ordinance attempts to establish standing, it is abundantly clear that neither a statute nor ordinance can provide standing to an individual or organization when the party does not have a concrete legal or equitable interest in the outcome of the litigation. See Duncan, 166 N.H. at 645 (striking down statute which granted standing to taxpayers to challenge unlawful spending by a municipality).

A. NWA does not have general standing to seek judicial relief

The New Hampshire Supreme Court has set forth the following principles for courts to apply in determining whether a party has standing to seek judicial relief:

> [W]e focus on whether the party suffered a legal injury against which the law was designed to protect. Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest. Rather, the party must show that its own rights have been or will be directly affected.

State v. Actavis Pharma, Inc., 170 N.H. 211, 215 (2017) (quotations omitted), cert. denied, 138 S. Ct. 1261 (2018).

A party must have a direct and apparent interest in the outcome of the case in order to intervene. Snyder, 134 N.H. at 35. NWA has no apparent legal rights at stake in the underlying litigation. Contrary to NWA's argument, playing an integral role in the passage of an ordinance by itself does not create a sufficiently direct and apparent interest in litigation involving said ordinance. See Doc. 11 at 4. Nor does the fact that an "unfavorable result . . . would waste the resources that the NWA invested in promotion and securing the right to local self-government" create a direct and apparent interest either. Id.; see Samyn-D'Elia Architects, P.A. v. Salter Cos., 137 N.H. 174, 177–78 (1993). Indeed, if this were the case, then it would open the floodgates for any number of special interest groups to intervene in litigation involving laws they lobbied for or against. Any lobbyist, political action committee, political party, or even candidate who supported specific legislative could move to intervene under NWA's interpretation. It would essentially create a situation in which the trial courts would become inundated with briefs from would-be intervenors every time the Court is asked to rule on the validity of a controversial law. From a public policy perspective, and in the interests of judicial economy, this cannot be the intended purpose of intervention.

NWA's position is not analogous to that of the Office of Mediation and Arbitration ("OMA") in Lamarche. In Lamarche, the Supreme Court ruled that a government agency had standing to intervene on in an interlocutory appeal to defend the constitutionality of a Superior Court rule which collected fees to fund its operation. Lamarche, 158 N.H. at 199. The OMA therefore had a direct and apparent interest in

the outcome of the appeal, even if it did not have any interest in the underlying tort litigation. Id. at 201. In other words, the source of funds to maintain OMA's operations was dependent on the constitutionality of the court rule governing alternative dispute resolution. Here, however, NWA has no such direct and apparent interest. Whether the Ordinance is struck down or upheld has no bearing whatsoever on the funding or continued operation of the NWA as a non-profit organization. Whether the Ordinance is constitutional or not has no bearing on NWA's ability to continue to represent the residents of Nottingham, and to continue advocating and educating as it wishes. See Doc. 11 at 2 ("The New Hampshire Department of State lists the NWA's principle purpose as 'educat[ing] the residents of Nottingham about local self-government.'"). Thus, NWA has no legally cognizable interest in the outcome of this litigation.

NWA's position is more akin to that of the Aviation Association in Rye v. Ciborowski, 111 N.H. 77 (1971). In, the Supreme Court affirmed the trial court's denial of intervention by the Aviation Association of New Hampshire. Id. at 82. The underlying dispute was over the scope of the defendant's variance to operate a private landing strip on his property. Id. The Aviation Association sought to intervene in the case to brief the trial court on the desirability of the location as an airport, and the trial court denied the motion. Id. The Supreme Court affirmed this denial, finding that the issue before the trial court related to the scope of the variance granted to the defendant. Id. Therefore the Aviation Association had no interest in the case and the denial of its motion to intervene was not an abuse of discretion. Id.

Here, NWA is similarly situated as a special interest group seeking to defend an Ordinance it lobbied to enact. It is neither a party nor a representative of any of the

parties in the underlying dispute (though it does purport to represent *some* of the taxpayers of Nottingham). For these reasons, the Court finds that NWA does not have a "direct and apparent interest" in the outcome of the case that would suffer or be sacrificed by the Court denying its motion to intervene. See Snyder, 134 N.H. at 35.

In summary, the Court concludes that NWA has neither any legal rights at stake nor a "direct and apparent" interest in the outcome of this litigation. For these reasons, NWA does not have standing to intervene under the general standing principles embodied in the New Hampshire Constitution.

B. NWA does not have standing under Pt. I, Art. 8 of the New Hampshire Constitution.

While NWA does not have standing under the general principles established in the State Constitution, the Court must address whether a recent amendment to the New Hampshire Constitution, which expanded standing to taxpayers is a basis for NWA's motion to intervene. In November 2018, voters in New Hampshire amended the State Constitution to state in relevant part:

> [A]ny individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.

N.H. Const. Part I, Art. 8.

When the Court's inquiry requires it to interpret a provision of the Constitution, it must look to the provision's purpose and intent. Warburton v. Thomas, 136 N.H. 383, 386-87 (1992). "The first resort is the natural significance of the words used by the framers. The simplest and most obvious interpretation of a constitution, if in itself

sensible, is most likely to be that meant by the people in its adoption." Bd. of Trustees, N.H. Judicial Ret. Plan v. Sec'y of State, 161 N.H. 49, 53 (2010) (internal quotations omitted). Thus, in interpreting the meaning of Part I, Article 8 of the Constitution, the Court must inquire into both the plain meaning of the language as understood by the voters who ratified the amendment as well as the surrounding circumstances in which it was passed. See Warburton, 136 N.H. at 387.

The plain language of the constitutional amendment states that it grants taxpayers the standing to petition the court to determine whether a state or political subdivision has spent or allocated funds "in violation of a law, ordinance or constitutional provision." N.H. Const. pt. I, art. 8 (emphasis added). Alone, this language establishes that taxpayers in New Hampshire would have standing to seek a declaratory judgment when there is an allegation that a town acted unlawfully. The plain language of the provision does not support the proposition that a taxpayer can seek a declaration that an ordinance is a lawful exercise of power—which is NWA's position here.

Moreover, the historical context in which the amendment was passed— including its relationship to previous attempts by the legislature to create generalized taxpayer standing—makes it clear that the intent of the amendment was to create standing to *challenge* government spending which violates the law or Constitution. The 2018 constitutional amendment establishing so-called "taxpayer standing" was added to Part I, Article 8 of the New Hampshire Constitution. The first sentence of that constitutional provision establishes the principle that all government actors must be accountable to the people. There is no need to seek judicial intervention simply to declare that

municipal government has passed a lawful ordinance. To do so would not further the goal of Article 8, namely to hold the government accountable. Governments (or their officials) need only be held to answer for their conduct if they take action that violates the law. This is the principle that the language of the 2018 amendment codified in the New Hampshire Constitution.

This interpretation is consistent with the historical context in which the 2018 amendment was ratified. In 2012, in response to a series of decisions by the Supreme Court that limited taxpayer standing for declaratory judgment actions, the legislature amended RSA 491:22 to create general taxpayer standing in such actions. The statute stated in relevant part:

> The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

RSA 491:22 (as amended in 2012).

The invalidation of this provision of the Declaratory Judgment Statute by the New Hampshire Supreme Court ultimately precipitated the aforementioned efforts to amend the New Hampshire Constitution. See Duncan v. State, 166 N.H. 630 (2014). Thus, the statute's language is illustrative of the intent of the 2018 amendment—to overrule the holding in Duncan and allow taxpayers to have standing to *challenge* laws in declaratory judgment actions—and not to intervene in their defense. See RSA 491:22 ("therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district ... has engaged, or

proposes to engage, in conduct that is unlawful or unauthorized") (emphasis added). Therefore, because NWA is moving to intervene *in support of* a challenged law and not to challenge the law itself, NWA's motion does not fall within the rights guaranteed under Part I, Article 8 of the New Hampshire Constitution.

II. NWA May Seek Status as an Amicus Curiae Without Standing to Pursue Judicial Relief.

Although the Court finds that NWA does not have standing to intervene, the Court has considered the related issue of whether NWA should be allowed to participate in this litigation as amicus curiae. An amicus curiae, or literally a "friend of the court," is not a party to a lawsuit but either (1) petitions the Court or (2) is requested by the Court to file a brief because that entity has a strong interest in the subject matter. See Black's Law Dictionary at 102 (10th ed. 2014). The Court recognizes that neither party has requested that NWA join the lawsuit as amicus curiae and that in such a case, the Court should exercise caution in inviting an amicus brief. See Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970). However, where the amicus falls short of a right to intervene but still has a "special interest that justifies [its] having a say," the Court in its discretion may extend the invitation. See id.

Indeed, New Hampshire courts appear to have implicitly adopted this principle in G2003B, LLC v. Town of Weare. In that case, the Supreme Court upheld the trial court's decision to allow residents of a town to intervene in a limited role. G2003B, 153 N.H. at 726–28. In G2003B, citizens passed an ordinance by ballot initiative that imposed a historic overlay district which encompassed the plaintiff's property and that prevented its subdivision and development. Id. at 726. Both the Weare board of selectmen and the town planning board opposed this ordinance. Id. After the plaintiff

sued alleging an unconstitutional taking, the town invited those citizens who circulated the petition to intervene because it "did not intend to expend the amount of money from the town budget necessary for a vigorous defense of the action." Id. While the trial court granted intervenor status to the citizens, it did so in a limited role, and they did not step in and legally represent the party defendants. Id. at 726–28. Indeed, the intervening citizens conceded on appeal that they could not act as a true party, and therefore could not block a consent decree between the town and the plaintiff. Id. at 728. Nonetheless, the trial court allowed the intervenors to argue why the overlay district was constitutional as to the subject parcel. Id. Although the decision describes the taxpayers in G2003B as having limited standing as intervenors, it appears that their role was more akin to amicus curiae to provide legal arguments in support of the constitutionality of the taxpayer-initiated ordinance where the town did not intend to do so.

At the New Hampshire Supreme Court, the role of amicus curiae is governed by Rule 30, and they may only participate in litigation by leave of the Court. Sup. Ct. R. 30. The Superior Court's rules are silent as to the issue of amicus curiae. This Court is unaware of any reported New Hampshire case addressing the role amicus curiae at the trial court level. Nonetheless, the Court retains the inherent authority to appoint amicus curiae at its discretion for the benefit of the Court. See Strasser, 432 F.2d at 569; Verizon New England v. Me. PUC, 229 F.R.D. 335, 338 (D. Me. 2005); Alliance of Auto. Mfrs. v. Gwadowsky, 297 F.Supp.2d 305, 306–07 (D. Me. 2003); see also Garabedian, 106 N.H. at 157 (observing that "courts of general jurisdiction in New Hampshire have 'inherent rule-making authority' to regulate their proceedings "as justice may require").

Alliance of Auto. Mfrs. v. Gwadowsky is particularly illustrative of the role amicus curiae can fill in the trial court. In Gwadowsky, the district court allowed an industry group to participate as amicus curiae in a lawsuit challenging a piece of legislation. Gwadowsky, 295 F.Supp.2d at 307–08. The court noted that the industry group had strongly supported the legislation at issue, had a unique and special interest in the outcome of the litigation, and was in a position to increase the court's basis of knowledge on the impact of the legislation from an industry standpoint. Id. at 307. Moreover, the industry group was allowed to participate as amicus curiae despite the fact that Maine's Attorney General was already adequately defending the challenged statute in the lawsuit. Id.

While NWA does not have a direct and apparent stake in this case sufficient to establish standing, it is undeniable that it does have some connection to the subject matter of the lawsuit. As NWA points out in its motion to intervene, it played an integral role in the passage of the Ordinance by expending time and resources both drafting the Ordinance and lobbying for its passage. Doc. 11 at 4. Moreover, it averred that it represents the views of over 100 residents of the Town of Nottingham. Id. at 7. Thus, just as the industry group in Gwadowsky and the taxpayers in G2003B were able to provide important insights to the Court, NWA may be able to provide a valuable perspective as to the impact of the legislation on the residents of Nottingham that it represents.

The issue of whether to allow a potential intervenor the opportunity to participate even in a limited role depends on whether the prospective intervenor's rights are already adequately represented in the litigation. See In re Stapleford, 156 N.H. 260,

262–63 (2006). In Stapleford, the Supreme Court affirmed the denial of a motion filed by two minor children to intervene in their parent's divorce. Id. at 263. The Court agreed with the marital master that the guardian ad litem (GAL) "represented the children's best interests and had adequately reported their preferences." Id. at 262. The Court also refused to apply the traditional intervention test, finding that as minors who lacked legal capacity, the appointment of a GAL is the traditional way to ensure that their interests were legally represented. Id. at 263; but see In re Goodlander and Tamposi, 161 N.H. 490, 506 (2011) (allowing the intervention of *adult* children in their parents' divorce proceedings to protect their interests as the beneficiaries of a trust).

Generally, an intervenor's rights are adequately represented by government. Public Service Co. of New Hampshire v. Patch, 136 F.3d 197, 207 (1st Cir. 1998); Acra Turf Club, LLC v. Zanzuccki, 561 Fed.Appx. 219, 222 (3rd Cir. 2014) (affirming the trial court's denial of an organization's intervention as of right because its interests in the validity of the statute being challenged were sufficiently represented by the New Jersey Attorney General). In Patch, the First Circuit affirmed the district court's denial of intervention by rate paying utility consumers in a dispute between electric companies and the New Hampshire Public Utilities Commission ("PUC") because the PUC adequately represented their interests.[3] The Court held that the party seeking intervention bears the burden to prove "some tangible basis to support a claim of purported inadequacy" of representation. Id. Moreover, because their interests were represented by members of a representative government body, "the burden of persuasion is ratcheted upward," and the would-be intervenors must overcome a

[3] This case was decided interpreting Fed. R. Civ. P. 24(a). However, the federal rule mirrors the requirements for intervention in New Hampshire, so the Circuit Court's analysis is relevant here. Compare the elements of Fed. R. Civ. P. 24(a), with Super. Ct. Civ. R. 7 and Snyder, 134 N.H. at 34.

rebuttable presumption of adequate representation. Id. To overcome this presumption, intervenors must "demonstrate adversity of interest, collusion, or nonfeasance" in the representation. Moosehead Sanitary Dist. v. S. G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979); but see Daggett v. Comm'n on Gov't Ethics and Election Practices, 172 F.3d 104, 111 (1st Cir. 1999) (clarifying that Moosehead does not create an exclusive list of considerations). These cases illustrate the general principle that elected government officials adequately represent the interests of their constituents in litigation.

At this stage of the present litigation there is no evidence in the record that the residents' interests are not adequately represented by the Town government. Unlike the Town of Weare in G2003B, the Town of Nottingham has given no indication that it does not intend to vigorously defend the Ordinance. Indeed, the Town timely filed both an appearance and an answer to the complaint. See Docs. 3, 8. Furthermore, the burden is on NWA to overcome the presumption of adequate representation when a government representative defends a law on behalf of taxpayers. Other than alleging that the "municipal corporation" does not in fact represent the taxpayers of Nottingham—an assertion which is not in alignment with universally accepted constitutional principles—NWA brings forth no argument as to why the town's representation is inadequate. It has made no specific allegations of any "adversity of interests, collusion, or nonfeasance" on the part of the town. See Moosehead, 610 F.2d at 54. Moreover, NWA does not allege that the Town does not have the resources to vigorously defend the Ordinance. Absent such a showing, NWA's motion to intervene may be denied as the residents of Nottingham are adequately represented by the Town of Nottingham.

At this stage of the litigation, the Court will not grant NWA permission to intervene in this action, even in the limited role as amicus curiae. NWA may renew its motion if it can demonstrate that the Town of Nottingham will not adequately defend the constitutionality of the ordinance. If granted amicus status, NWA will only be allowed to participate in this case in a limited role. See Gwadowsky, 295 F.Supp.2d at 307–08. NWA may file briefs and memoranda on motions before the Court. See id. However, in this role, NWA is not a party to the lawsuit and does not legally represent any party to the lawsuit. Therefore, NWA would not have right to engage in any discovery. Nor would it have authority to file any substantive motions seeking relief from the Court.

NWD has filed a Motion to Dismiss (Doc. 12) arguing that the plaintiffs do not have standing to seek declaratory judgment. The Court will not consider this motion on its merits because NWA does not have standing to seek judicial relief. NWA is also not permitted to file other substantive motions, such as motions for summary judgment. The Court reserves until a later date the decision as to what extent, if any, NWA may participate as an amicus curiae in submitting legal memoranda or participating in oral arguments on dispositive motions.

Conclusion

Consistent with the foregoing, the Court holds that NWA does not have standing to intervene in this case. Consequently, the NWA's' motion to intervene is DENIED.

SO ORDERED.

8/6/2019

DATE

N. William Delker
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties

The State of New Hampshire

ROCKINGHAM **SUPERIOR COURT**

BRENT TWEED, ET AL.

V.

TOWN OF NOTTINGHAM, ET AL

NO. 218-2019-CV-0398

ORDER ON NOTTINGHAM WATER ALLIANCE'S MOTION TO INTERVENE

Plaintiffs Brent Tweed and G&F Foods, LLC, initiated this action against the Town of Nottingham (the "Town") to challenge the validity of a municipal ordinance. See Compl. (Doc. 1). Pending before the Court is Plaintiffs' motion for summary judgment. See Pls.' Mot. Summ. J. (Doc. 26). The Nottingham Water Alliance ("NWA") wants to support the ordinance and oppose Plaintiffs' motion. The only issue decided in this order is whether NWA should be allowed to intervene in support of the ordinance.

NWA moved to intervene early in the litigation, but was denied by the Court. See Mot. to Intervene (Doc. 11); Aug. 6, 2019 Order (Doc. 17). NWA sought reconsideration, which was denied. See Mot. Recon. (Doc. 18); id. (margin order dated Aug. 28, 2019).[1]

As noted above, Plaintiffs have moved for summary judgment. The Town has objected only to the extent that Plaintiffs are seeking legal fees. See Def.'s Obj. and Mem. (Doc. 29 and 30). As a result of the Town's limited objection, NWA has renewed its motion to intervene. See NWA's Second Mot. Intervene (Doc. 35). Plaintiffs object.

[1] NWA incorrectly asserts in its current filing that the Court never ruled on its prior motion to reconsider. See id.

See Pls.' Obj. (Doc. 37). For following reasons, NWA's renewed motion to intervene is **DENIED**. However, the Court invites NWA to participate in the litigation as amicus curiae consistent with the instructions in this Order.

FACTUAL AND PROCEDURAL BACKGROUND

On March 16, 2019, voters in Nottingham voted to enact the "Freedom from Chemical Trespass Rights-Based Ordinance" (the "Ordinance"). See Doc. 1, Ex. 1. Among other things, the Ordinance purports to recognize or impose certain obligations on business and government entities. A violation of those obligations would expose the violator to a fine of $1,000 per day. Id. § 2(a). The Ordinance further purports to create a right for any resident, ecosystem, or natural community "to intervene in any action concerning this Ordinance." Id. § 2(d).

Plaintiffs, an individual resident of Nottingham and a Delaware limited liability company doing business in New Hampshire, filed this action seeking a declaratory judgment against the Town declaring the Ordinance invalid. Doc. 1, Prayer A. Plaintiffs argued that the Ordinance "is contrary to United States and New Hampshire constitutional, statutory, and common law" because it is ultra vires, seeks to regulate a field preempted by state law, is constitutionally void for vagueness, and violates the separation of powers doctrine. Id. ¶ 32. After the Town filed an answer, NWA moved to intervene in the action. See Doc. 11.

In its motion, NWA argued that it had a right to intervene in the case because: (1) it had "catalyzed the adoption of the Ordinance"; (2) it has a right to "local self-government"; (3) the Ordinance "bestows upon resident[s] the right to enforce the lawsuit and to participate in lawsuits concerning its legality"; and (4) "the disputed

Ordinance applies distinctly to [] NWA and its individual members." Id. at 4–5. NWA further argued that it had a right to intervene because "the Town . . . does not adequately represent [] NWA's interests" and that the Town's reasons for defending the Ordinance are distinct from NWA's. Id. at 5.

The Court (Delker, J.) issued an Order denying NWA's motion to intervene on August 6, 2019 (the "August 6 Order"). See Doc. 17. In the August 6 Order, the Court determined that NWA did not have general standing to intervene in the action. Id. The Court ruled:

> A party must have a direct and apparent interest in the outcome of the case in order to intervene. Snyder [v. N.H. Sav. Bank, 134 N.H. 32, 35 (1991)]. NWA has no apparent legal rights at stake in the underlying litigation. Contrary to NWA's argument, playing an integral role in the passage of an ordinance by itself does not create a sufficiently direct and apparent interest in litigation involving said ordinance. See Doc. 11 at 4. Nor does the fact that an "unfavorable result … would waste the resources that the NWA invested in promotion and securing the right to local self-government" create a direct and apparent interest either. Id.; see Samyn-D'Elia Architects, P.A. v. Salter Cos., 137 N.H. 174, 177–78 (1993). Indeed, if this were the case, then it would open the flood gates for any number of special interest groups to intervene in litigation involving laws they lobbied for or against…. From a public policy perspective, and in the interests of judicial economy, this cannot be the intended purpose of intervention.

Id. at 7. The Court then went on to determine that NWA did not have standing under Part I, Article 8 of the New Hampshire Constitution:

> The plain language of the constitutional amendment states that it grants tax payers the standing to petition the court to determine whether a state or political subdivision has spent or allocated funds "in violation of a law, ordinance or constitutional provision." N.H. Const. pt. I, art. 8 (emphasis added). Alone, this language establishes that taxpayers in New Hampshire would have standing to seek a declaratory judgment when there is an allegation that a town acted unlawfully. The plain language of the provision does not support the proposition that a taxpayer can seek a declaration that an ordinance is a lawful exercise of power—which is NWA's position here.

Id. at 10 (emphasis in original).

In the August 6 Order, the Court also considered whether NWA "should be allowed to participate in this litigation as amicus curiae." Id. at 12. As the Superior Court's rules do not set forth guidelines for amicus participation, the Court set forth a detailed analysis as to the propriety of accepting arguments from a putative intervenor who has fallen short of establishing a right to intervene. Id. at 12–17. The Court ultimately concluded that it would not invite NWA to file an amicus brief because NWA was unable to demonstrate that the Town would not adequately defend the constitutionality of the Ordinance. Id. at 17.

On January 13, 2020, Plaintiffs moved for summary judgment. See Doc. 26. Although the Town filed an objection, it did not defend the constitutionality of the Ordinance, but rather limited its objection to Plaintiffs' request for attorney's fees. See Doc. 29; see also Doc. 30. As a result of the Town's limited objection, NWA renewed its motion to intervene.

ANALYSIS

NWA argues that it should now be allowed to intervene as a full party to the action because the Town has demonstrated that it will not defend the constitutionality of the Ordinance. See Doc. 35 ¶¶ 9–19. In particular, NWA asserts that it should be allowed to intervene "so that the Court may see two sides to the discussion of the Ordinance's validity before ruling on the Plaintiffs' motion for Summary Judgment." Id. ¶ 9. It further argues that it has a "direct and apparent interest" in the litigation because "[The Town] seek[s] now to denounce NWA members' right to local self-government and to simultaneously deprive them of this right by allowing the Ordinance to be

overturned without the Court hearing from the perspective of those who hold this right and stand to lose it." Id. ¶ 13. In so arguing, NWA analogizes itself to the litigants in G2003B, LLC v. Town of Weare, 153 N.H. 725 (2006), which the Court analyzed in the August 6 Order. NWA asserts that because the facts now resemble those of G2003B, it has standing to intervene as a party. Id. ¶ 15 (citing Doc. 17 at 16).

While, the Court agrees that the facts in this case are now more in line with G2003B than they were at the time the Court issued the August 6 Order, it appears NWA misunderstands the Court's discussion of G2003B. In the August 6 Order, the Court considered G2003B to determine the propriety of inviting NWA to join as an amicus curiae, not as a full party to the case. As the August 6 Order has great bearing on its decision on this motion, the Court reproduces it in relevant part here:

> An amicus curiae, or literally a "friend of the court," is not a party to a lawsuit but either (1) petitions the Court or (2) is requested by the Court to file a brief because that entity has a strong interest in the subject matter. See Black's Law Dictionary at 102 (10th ed. 2014). … [W]here the amicus falls short of a right to intervene but still has a "special interest that justifies [its] having a say," the Court in its discretion may extend the invitation. See [Strasser v. Doorly, 432 F.2d 567, 569 (1st Cir. 1970)].
>
> Indeed, New Hampshire courts appear to have implicitly adopted this principle in G2003B, LLC V. Town of Weare. In that case, the Supreme Court upheld the trial court's decision to allow residents to intervene in a limited role. G2003B, 153 N.H. at 726–28. In G2003B, citizens passed an ordinance by ballot initiative that imposed a historic overlay district which encompassed the plaintiff's property and that prevented its subdivision and development. Id. at 726. Both the Weare board of selectmen and the town planning board opposed the ordinance. Id. After the plaintiff sued alleging an unconstitutional taking, the town invited those citizens who circulated the petition to intervene because it "did not intend to expend the amount of money from the town budget necessary for a vigorous defense of the action." Id. While the trial court granted intervenor status to the citizens, it did so in a limited role, and they did not have step in and legally represent the party defendants. Id. at 726–28. Indeed, the intervening citizens conceded on appeal that they could not act as a true party, and therefore could not block a consent decree between the town and the

plaintiff. Id. at 728. Nonetheless, the trial court allowed the intervenors to argue why the overlay district was constitutional as to the subject parcel. Id. Although the decision describes the taxpayers in G2003B as having limited standing as intervenors, it appears that their role was more akin to amicus curiae to provide legal arguments in support of the constitutionality of the taxpayer-initiated ordinance where the town did not intend to do so.

. . .

The issue of whether to allow a potential intervenor the opportunity to participate even in a limited role depends on whether the prospective intervenor's rights are already adequately represented in the litigation. See In re Stapleford, 156 N.H. 260, 262–63 (2006). In Stapleford, the Supreme Court affirmed the denial of a motion filed by two minor children to intervene in their parent's divorce. Id. at 263. The Court agreed with the marital master that the guardian ad litem (GAL) "represented the children's best interests and had adequately reported their preferences." Id. at 262. The Court also refused to apply the traditional intervention test, finding that as minors who lacked legal capacity, the appointment of a GAL is the traditional way to ensure that their interests were legally represented. Id. at 263; but see In re Goodlander and Tamposi, 161 N.H. 490, 506 (2011) (allowing the intervention of adult children in their parents' divorce proceedings to protect their interests as the beneficiaries of a trust).

Generally, an intervenor's rights are adequately represented by government. Public Service Co. of New Hampshire v. Patch, 136 F.3d 197, 207 (1st Cir. 1998); Acra Turf Club, LLC v. Zanzuccki, 561 Fed.Appx. 219, 222 (3rd Cir. 2014) (affirming the trial court's denial of an organization's intervention as of right because its interests in the validity of the statute being challenged were sufficiently represented by the New Jersey Attorney General) … "[T]he burden of persuasion is ratcheted upward," and the would-be intervenors must overcome a rebuttable presumption of adequate representation. Id. To overcome this presumption, intervenors must "demonstrate adversity of interest, collusion, or nonfeasance" in the representation. Moosehead Sanitary Dist. v. S. G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979); but see Daggett v. Comm'n on Gov't Ethics and Election Practices, 172 F.3d 104, 111 (1st Cir. 1999) (clarifying that Moosehead does not create an exclusive list of considerations). These cases illustrate the general principle that elected government officials adequately represent the interests of their constituents in litigation.

At this stage of the present litigation there is no evidence in the record that the residents' interests are not adequately represented by the Town government. Unlike the Town of Weare in G2003B, the Town of Nottingham has given no indication that it does not intend to vigorously

> defend the Ordinance. Indeed, the Town timely filed both an appearance and an answer to the complaint. See Docs. 3, 8. Furthermore, the burden is on NWA to overcome the presumption of adequate representation when a government representative defends a law on behalf of taxpayers. Other than alleging that the "municipal corporation" does not in fact represent the taxpayers of Nottingham—an assertion which is not in alignment with universally accepted constitutional principles—NWA brings forth no argument as to why the town's representation is inadequate. It has made no specific allegations of any "adversity of interests, collusion, or nonfeasance" on the part of the town. See Moosehead, 610 F.2d at 54. Moreover, NWA does not allege that the Town does not have the resources to vigorously defend the Ordinance. Absent such a showing, NWA's motion to intervene may be denied as the residents of Nottingham are adequately represented by the Town of Nottingham.

Doc. 17. at 12–16.

At the time the Court issued the August 6 Order, there was no indication that the Town would not adequately represent NWA's interests by defending the constitutionality of the Ordinance. At this point, the circumstances have changed, and it is clear the Town does not intend to contest Plaintiffs' position. See Doc. 30. Although NWA avers that this development gives them standing to join the lawsuit as a party, the Court disagrees. The August 6 Order clearly stated that if circumstances in the litigation changed, the Court would reconsider allowing NWA to file an amicus brief in support of its position—not join the action as a party. Doc. 17 at 17.

Plaintiffs' argue that the Town's decision to contest only the attorneys' fees claim does not amount to an inadequate defense on the merits because the Town's position is relatively weak. See Doc. 37 ¶¶ 8–10 The issue here, however, is not whether defense's counsel has adequately represented the Town, but rather whether NWA's interest have been adequately represented by the Town. See Doc. 17 at 16, supra.

As NWA correctly points out, the Town does not intend to litigate the constitutionality of the Ordinance and instead seeks only to limit its exposure to

attorney's fees. See Doc. 30. As a result, the Court finds that NWA's interest in defending the constitutionality of the Ordinance is no longer being adequately represented by the Town. Accordingly, the Court invites NWA to participate in the litigation as amicus curiae. NWA has twenty (20) days from the date this Order is issued to file a memorandum with the Court, which it will review when considering Plaintiffs' motion for summary judgment. The Court notes that Plaintiffs are under no obligation to respond to NWA's amicus memorandum. Should they wish to respond, Plaintiffs will have ten (10) days from the date the amicus memorandum is filed to do so.

CONCLUSION

For the reasons stated above, NWA's renewed motion to intervene is **DENIED**. However, the Court invites NWA to participate in the litigation as amicus curiae consistent with the above instructions.

SO ORDERED.

April 16, 2020
Date

Judge Martin P. Honigberg

Clerk's Notice of Decision
Document Sent to Parties
on 04/16/2020